APPEAL NO. 171003
FILED JUNE 27, 2017

This appeal arises pursuant to the Texas Workers' Compensation Act, TEX. LAB. CODE ANN. § 401.001 *et seq*. (1989 Act). A contested case hearing (CCH) was held on April 4, 2017, in (city), Texas, with (hearing officer) presiding as hearing officer. The hearing officer resolved the disputed issues by deciding that: (1) the compensable injury of (date of injury), does not extend to lumbar disc displacement, lumbar radiculopathy, lumbar disc herniation, lumbar central spinal stenosis, and lumbar degenerative changes; (2) the appellant (claimant) reached maximum medical improvement (MMI) on November 19, 2015; and (3) the claimant's impairment rating (IR) is five percent.

The claimant appealed all of the hearing officer's determinations, contending that the evidence does not support the hearing officer's determinations. The respondent (carrier) responded, urging affirmance of the hearing officer's determinations.

DECISION

Affirmed in part and reversed and remanded in part.

The parties stipulated in part that the claimant sustained a compensable injury on (date of injury), that consisted of lumbar and thoracic sprains, and that the statutory date of MMI is August 23, 2016. The evidence reflects that the claimant was injured while using a jackhammer at work.

EXTENT OF INJURY

The hearing officer's determination that the compensable injury of (date of injury), does not extend to lumbar disc displacement, lumbar radiculopathy, lumbar disc herniation, lumbar central spinal stenosis, and lumbar degenerative changes is supported by sufficient evidence and is affirmed.

MMI/IR

Section 401.011(30)(A) defines MMI as "the earliest date after which, based on reasonable medical probability, further material recovery from or lasting improvement to an injury can no longer reasonably be anticipated." Section 408.1225(c) provides that the report of the designated doctor has presumptive weight, and the Texas Department of Insurance, Division of Workers' Compensation (Division) shall base its determination of whether the employee has reached MMI on the report of the designated doctor unless the preponderance of the other medical evidence is to the contrary. Section 408.125(c) provides that the report of the designated doctor shall have presumptive

weight, and the Division shall base the IR on that report unless the preponderance of the other medical evidence is to the contrary, and that, if the preponderance of the medical evidence contradicts the IR contained in the report of the designated doctor chosen by the Division, the Division shall adopt the IR of one of the other doctors. 28 TEX. ADMIN. CODE § 130.1(c)(3) (Rule 130.1(c)(3)) provides in pertinent part that the assignment of an IR shall be based on the injured employee's condition as of the MMI date considering the medical record and the certifying examination.

The hearing officer determined that the claimant reached MMI on November 19, 2015, with a five percent IR as certified by (Dr. B), the post-designated doctor required medical examination doctor. Dr. B examined the claimant on June 21, 2016. As noted above, the parties stipulated that the compensable injury consisted of lumbar and thoracic sprains. Dr. B noted in his narrative report a diagnosis of a lumbar sprain. However, nowhere in his report does Dr. B discuss a thoracic sprain. In his explanation of the claimant's IR Dr. B noted that the claimant "does have some pseudoradicular pain in his buttock and in the proximal thigh" and is "best described as having Category II, or [five percent] whole person impairment." We note that Dr. B did not specify the spinal region on which he was basing his IR. See Appeals Panel Decision (APD) 150558, decided May 8, 2015; APD 140608, decided May 12, 2014; APD 071817, decided December 12, 2007; APD 051306-s, decided August 3, 2005.

It is clear from Dr. B's report that he did not consider and rate the entire compensable injury. Accordingly, his MMI/IR certification cannot be adopted.

There is another MMI/IR certification in evidence that certifies the claimant reached MMI on November 19, 2015, with a five percent IR, which is from (Dr. KM), a doctor acting in place of the treating doctor. Dr. KM examined the claimant on December 9, 2015. However, Dr. KM's narrative report makes clear that in addition to thoracic and lumbar sprains, he also considered lumbar radiculitis and a minimal anterior wedge compression fracture deformity T6 vertebral body. Neither of these two conditions were litigated by the parties at the CCH nor have they been determined to be part of the compensable injury. Dr. KM's report does not consider and rate the compensable injury in this case, which is a thoracic sprain and lumbar sprain, and as such it cannot be adopted. Accordingly, we reverse the hearing officer's determinations that the claimant reached MMI on November 19, 2015, with a five percent IR.

There are other MMI/IR certifications in evidence, which are from (Dr. W), the designated doctor appointed by the Division. Dr. W initially examined the claimant on March 20, 2015, and certified that the claimant had not reached MMI but was expected to do so on or about September 20, 2015, based on a thoracic sprain, lumbar sprain, lumbar disc displacement, and lumbar radiculopathy. Dr. W next examined the claimant

for MMI/IR on April 12, 2016, and certified that the claimant had not reached MMI but was expected to do so on the statutory date of August 23, 2016, based on a thoracic sprain, lumbar sprain, lumbar disc displacement/herniation and central spinal stenosis/degenerative changes, and lumbar radiculopathy. Dr. W last examined the claimant on February 23, 2017, and certified that the claimant reached MMI on the statutory date of August 23, 2016, with a five percent IR, based on a thoracic sprain, lumbar sprain, lumbar disc displacement/herniation and central spinal stenosis/degenerative changes, and lumbar radiculitis. None of Dr. W's MMI/IR certifications consider and rate the compensable injury in this case, which is a thoracic sprain and lumbar sprain. Accordingly, none of his MMI/IR certifications can be adopted.

As there is no MMI/IR certification in evidence that can be adopted, we remand the issues of MMI and IR to the hearing officer for further action consistent with this decision.

SUMMARY

We affirm the hearing officer's determination that the compensable injury of (date of injury), does not extend to lumbar disc displacement, lumbar radiculopathy, lumbar disc herniation, lumbar central spinal stenosis, and lumbar degenerative changes.

We reverse the hearing officer's determination that the claimant reached MMI on November 19, 2015, and we remand the issue of MMI to the hearing officer for further action consistent with this decision.

We reverse the hearing officer's determination that the claimant's IR is five percent and we remand the issue of IR to the hearing officer for further action consistent with this decision.

REMAND INSTRUCTIONS

Dr. W is the designated doctor in this case. On remand, the hearing officer is to determine whether Dr. W is still qualified and available to be the designated doctor. If Dr. W is no longer qualified or available to serve as the designated doctor, then another designated doctor is to be appointed to determine the claimant's MMI and IR for the (date of injury), compensable injury.

The hearing officer is to inform the designated doctor that the compensable injury is a thoracic sprain and lumbar sprain, and that the statutory date of MMI is August 23, 2016. The hearing officer is to request the designated doctor give an opinion on the claimant's MMI, which can be no later than August 23, 2016, the statutory date of MMI

(Section 401.011(30)), and IR by rating the entire compensable injury as of the date of MMI in accordance with the Guides to the Evaluation of Permanent Impairment, fourth edition (1st, 2nd, 3rd, or 4th printing, including corrections and changes as issued by the American Medical Association prior to May 16, 2000)(AMA Guides), considering the medical record and the certifying examination.

The parties are to be provided with the designated doctor's MMI/IR certification. The hearing officer is then to make a determination on MMI and IR consistent with this decision.

Pending resolution of the remand, a final decision has not been made in this case. However, since reversal and remand necessitate the issuance of a new decision and order by the hearing officer, a party who wishes to appeal from such new decision must file a request for review not later than 15 days after the date on which such new decision is received from the Division, pursuant to Section 410.202 which was amended June 17, 2001, to exclude Saturdays and Sundays and holidays listed in Section 662.003 of the Texas Government Code in the computation of the 15-day appeal and response periods. *See* APD 060721, decided June 12, 2006.

The true corporate name of the insurance carrier is **INDEMNITY INSURANCE COMPANY OF NORTH AMERICA** and the name and address of its registered agent for service of process is

CT CORPORATION SYSTEM
1999 BRYAN STREET, SUITE 900
DALLAS, TEXAS 75201-3136.

Carisa Space-Beam
Appeals Judge

CONCUR:

K. Eugene Kraft
Appeals Judge

Margaret L. Turner
Appeals Judge